

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19**

RITE AID CORPORATION

Employer

and

Case 19-RC-14258

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 367, AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions:

SUMMARY

The Employer operates a nationwide chain of retail drug stores. The petitioner seeks a unit of the entire Employer's Yelm, Washington store, but excluding the pharmacists. The Employer contends that the store's Front End Key Associates, hereinafter referred to as "Keys" or "Key Associates", should be excluded from the unit since they are statutory supervisors, and the store's two Pharmacy Technicians should be excluded as technical employees who do not share a community of interest with the other employees.

I conclude that the Keys are statutory supervisors, but the Pharmacy Technicians should be included in the Unit. Therefore, the following constitutes an appropriate unit:¹

All employees of the Employer employed at its Yelm, Washington store, excluding professional employees (including registered pharmacists) and confidential employees, guards, and supervisors as defined by the Act (including front end key associates).

¹ The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and section 2(6) and (7) of the Act.

BACKGROUND

As noted above, the Employer operates a chain of drugstores nationwide. The facility that is the subject of the instant petition is located at 909 East Yelm Avenue, Yelm, Washington. This facility is divided into a pharmacy, and a general merchandise section, which sells seasonal merchandise, greeting cards, and garden products and contains a photo department. The pharmacy is located at the rear of the store. The pharmacy is enclosed with windows looking out into the store. There are two cash registers inside the pharmacy, and there are two windows. There is also a drive-in section connected to the pharmacy.

Matt Stahl, who holds the position of Store Manager and was the only witness to testify at this hearing, operates the store. He has held every position for the Employer from Cashier to Supervisor, Assistant Manager to Store Manager. At the time of the hearing, Stahl had been at the Yelm store for one week, after spending four months at the Lacey, Washington store. Prior to that, Stahl had been the Yelm Store Manager for two years. He works Monday through Friday from 7:00 a.m. to 5:00 p.m. The store hours are Monday through Friday 8:00 a.m. to 9:00 p.m., Saturday 9:00 a.m. to 7:00 p.m., and Sunday 9:00 a.m. to 6:00 p.m.

Presently, there is no Assistant Manager at Yelm.² The store has three Key Associates, Seth Lolley, Donna Jones and Marisel McKinley. Scott Stewart manages the pharmacy. There are two Pharmacy Technicians working under Stewart.

Finally, there are seven Cashier/Clerks who work at the front of the store but also serve as stock employees when not operating a register. Such assignments include stocking shelves, cleaning and straightening out shelves, watering plants, getting shopping carts, working on truck deliveries and helping customers.

THE KEY ASSOCIATES

The Store Manager conducts hiring and firing. With respect to discipline, the record reflects that the Keys have authority to issue formal written notices without having to seek further approval. The record does not show the import of such a document, such as completing a set step in a set progressive discipline system. The Employer could show no example of Keys having issued such a warning; indeed, Stahl has not issued one either. The Employer presented evidence of another type of written warning, which the Keys and the Store manager are also authorized to issue. This particular written warning is issued to employees for failing to meet company standards, such as money shortages. According to the Store Manager, this warning goes into the employee file and can lead to discharge.³ However, the record does not indicate that the decision to issue such a warning requires judgment, as opposed to simply issuing the document if the till is off by a set amount. The Employer could show no example of a Key Associate ever issuing this type of warning. The record reflects that Keys have been given the authority to send home an employee that is caught stealing, but they have yet to do so.

² The record does not reflect how an Assistant Store Manager would fit into the facility's operational scheme, whether the position will be filled, and how, if at all, the role of the Key Associates portrayed in the record would change with the presence of an Assistant Manager.

³ In order to be subjected to a discharge, the employee must commit three of the exact same offenses. Thus, three shortages subject an employee to possible discharge.

Finally, there is evidence that Stahl and the Keys have discussed Stahl's preferred policy of first giving a verbal notice before a written warning is issued. There is no evidence that the Keys have issued this type of reprimand either. There is no evidence that the Cashiers have been advised that the keys are vested with disciplinary authority.

Work assignments are normally assigned in advance by the Store Manager. The Keys do make out work assignments when the Store Manager is on vacation, or when something happens that does not allow the Store Manager to perform this task. The record also shows that, on those occasions when the Key Associate makes out assignments, the decision is based on the skill level of the individual employee. Whether such a decision requires significant judgment, or only a recall that that individual "knows" how to cashier, or "knows" the candy aisle, is not clear from the record.

When an employee is going to be late or absent, the employee is required to call either the Store Manager or Key Associate. The Key is responsible for filling the resulting slot. The decision on whom to call in is also based on the Key's evaluating the skill level of the individual employee. Again, the level of judgment required is not clear in the record. Similarly, if an employee needs to leave early, the employee must request time off from either the Store Manager or the Keys. The Keys make the decision on whether the excused employee's shift needs to be filled. When deciding to call a fill-in, the Key Associate looks at the written schedule to see who is available. The record is clear that Keys have placed employees in overtime status when called upon to make this decision, and that this decision is a judgment call that the Keys have been authorized to make. There is no evidence that the Key Associate has had to contact the Store Manager when the Keys have decided to grant overtime. In the alternative, the Key Associate has called the next best person to replace the absent employee. The record does not reflect if the Keys can order an employee in, or must resort to their own persuasive abilities only.

Merchandise deliveries come in on Wednesdays. The Key Associate is responsible for directing employees in the processing of these deliveries. Store Manager and the Keys are the only persons with keys to the store, keys to the Store Manager's office, and with the combination to the store's safe. The Store Manager and the Keys supervise the finalization of voided transactions. Employees must notify either the Store Manager or the Keys when a cash pickup is necessary, and the Keys are responsible for making daily deposits.

The Employer has a management-training program. The Key Associates participate in this program, which is an eight-week or eight-class course, with each course lasting eight hours. This is the only management training that is offered to employees, and is the only course offered to anyone interested in being a Store Manager. There is no formal program whereby a Key is guaranteed promotion to a managerial position upon completion of specified training and experience, or is otherwise hired with the expectation of such a "scheduled" promotion. Participation is voluntary. There is no evidence that Cashiers may take this course. The Keys are paid at an hourly rate of between \$11.00 to \$13.00 an hour, whereas cashiers are paid from \$7.00 to \$10.00 an hour.

SUPERVISORY CONCLUSION

Based on the foregoing and the entire record, I find and conclude that the Key Associates are statutory supervisors based on their responsible direction of the workforce.

In order for one to be a statutory supervisor, one need exercise only one of 14 listed indicia, or effectively recommend such actions to a superior. The burden to establish supervisory status is on the party claiming such status. *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). In order to so qualify, the individual must make decisions regarding employees, within one of the listed indicia, independently, while exercising substantial judgment.

Judgments made by an individual, to be supervisory, must be of a level of difficulty exceeding merely "routine or clerical in nature". See Section 2(11) of the Act. The complexity of a given task is deemed equally complex (or simple) regardless of the identity of the performer. Thus, a decision that would be complex for a high school graduate to make does not become "routine or clerical" when performed by a Ph.D. Moreover, the critical question is the difficulty of the *decision* made by the alleged supervisor, not the complexity of the work performed by, or assigned the alleged supervisee. The *Kentucky River* Court, citing *Chevron Shipping Co.*, 320 NLRB 717, 729 (1996), found that if an employer constrains the degree of judgment by, for example, detailed orders or regulations, the individual may not rise to the level of a statutory supervisor. In *Chevron*, the Board found that although second and third mates acting as watch officers were responsible for "directing the unlicensed employees, assigning tasks, and ensuring the safety of the ship and its cargo...their exercise of independent judgment was circumscribed by the master's standing orders, and the Operating Regulations, which required watch officers to contact a superior when anything unusual occurred or when problems occurred." The standing orders detailed the officers' and crewmembers' duties and tasks. Further, watch officers had to be in constant contact with superior officers when there were deviations from the routine situations and had to notify the captain when they made any decisions on their own. Thus, their judgment was not "independent", and the Board found the officers to be employees rather than statutory supervisors.

In the instant petition, I find the evidence insufficient to establish the Keys possess any of the indicia of statutory supervisory authority other than the use of independent judgment in responsibly directing the workforce. There is no evidence that the supervisors have actual authority to hire or to make effective recommendations regarding same; likewise, regarding transfers, suspensions, layoffs, recalls, promotions, termination or rewards.

Regarding discipline, the Keys have authority to issue certain disciplinary actions. They have never done so, but it is the authority to act, rather than the exercise of the authority, that is controlling. Here, the record is insufficient to demonstrate 2(11) authority to discipline. Mere checking to see if an employee has complied with an established standard, such as till accuracy, does not call for independent judgment. Issuance of verbal or written reprimands does not constitute discipline without a showing that such reprimand has an impact on employees – for instance, that a verbal reprimand means that Step 1 of a formalized progressive disciplinary system has been met. The ability to send an employee home for an obvious, serious infraction, such as intoxication, assault or theft, without more, does not constitute 2(11) "discipline," when the incident

will later be investigated and resolved by a supervisor. (There is no indication here that sending an employee home under the circumstances described would automatically result in job loss or lost wages).

From the record, there is insufficient evidence that the Keys apply anything but routine or clerical judgment in assigning work. As noted above, the Store Manager makes assignments well in advance; how far in advance is not clear. According to Stahl's testimony, the extent of the Keys' authority to assign appears to be assigning a particular register to a Cashier. From the overall record, it would appear that the Key can jigger assignments to get the work done, as circumstances change. At best, the Key may use a degree of independent judgment in assigning work, but I find that it has not been shown to be beyond "routine or clerical" in complexity. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

I turn now to the last remaining indicium, "responsibly directing" employees. "Responsible direction" is a sort of catchall term. That is, the other indicia pertain to rather specific functions, such as "assign" or "discipline" or "hire." Responsible direction is an additional indicium that takes into account all manner and degree of supervisory responsibility, even though these various responsibilities individually do not rise to the level of meeting any particular statutory indicium, or do not even fall into any other *specific* indicium. For example, the fact that an individual reports disciplinary matters to a superior, but makes no recommendations, is a form of "discipline", but it will not meet the statutory indicium of "disciplines employees". Similarly, the fact that the individual "chews out" an employee for work mistakes, but that the remonstrance does not become an "official" warning that constitutes a step in a progressive discipline system, is also a form of discipline that does not meet the statutory minimum for "discipline". Nevertheless, these two forms of lesser supervisory authority, along with many others, may be assessed conjunctively to determine if the individual "responsibly directs." Another item that might be treated as an element of responsible direction would be assignment of overtime, an item that does not fall under any other statutory indicium. See *Hearst Broadcasting Corporation*, 267 NLRB 326 (1983). See, generally, the discussion of the legislative history of this indicium, in *Ohio Power Co.*, 80 NLRB 1334 (1948), quoted with approval in *Providence Hospital*, 320 NLRB 717 (1996), at fn. 24.

The evidence reveals that the Keys responsibly direct the work force within the meaning of Section 2(11). First, I rely on the fact that, on Saturdays, Sundays and week days from 5:00 p.m. to 9:00 p.m., the Keys are the highest and only level of management on site.⁴ This is 34 of the 84 hours the store is open weekly. There is no showing that the Keys are in regular phone contact with Stahl, or are expected to bring non-routine matters to his immediate attention.

Second, the Keys have a role in the disciplinary process. They can issue oral or written reprimands, although the precise impact of their disciplinary actions is unclear from the record. Implicit in this authority is an understanding that the Keys are in charge and employees must honor their directives.

Third, the Keys are responsible for getting the shift's work accomplished. They must juggle the workload to keep the cashier stands appropriately manned, yet still accomplish the stocking and other tasks required to run the store.

⁴ Excepting perhaps the pharmacist whose authority at most appears to extend to the techs only.

Fourth, the Keys authorize planned absences, such as leaving early. They can authorize calling in a substitute, even if it requires payment of overtime. They are charged with deciding whether to call in a substitute for an employee who calls in sick and for finding a substitute, at overtime rates if necessary.

Fifth, the Keys are paid substantially more than their subordinates, have keys to the store and to the locus of authority (the Manager's office), and hold the combination to the store safe. Admittedly, some of these factors may be "secondary" characteristics of supervision – such as higher pay – but they are indicative of higher authority and responsibility.

Based most heavily on the foregoing factors, but also on the entire record, I find and conclude that the Keys are supervisors within the meaning of the Act based on their responsible direction of the workforce.. Accordingly, I shall omit them from the Unit.⁵

UNIT FACTS

As described above, the facility contains a pharmacy, which is managed by registered pharmacist Scott Stewart. Stewart takes his direction from Stahl, the Store Manager. Two Pharmacy Technicians, Willie Merryman and Chelly Corak assist him. They are classified as Pharmacy Technicians A; an "A" Technician needs to be certified by the State. A "B" Technician is basically a cashier in the pharmacy, with few other duties. The record reflects that Chelly Corak transferred from the position of store cashier – at whose initiative is not clear. However, no one in the pharmacy department has transferred over to Key Associate or Cashier during Stahl's tenure as Store Manager. The evidence shows that the pharmacist trains these technicians on the job. They are also required to attend a six-month program, which calls for an eight-hour session once a month outside the store. An Employer pharmacist also teaches this class. At the conclusion of this class, they are tested by their in-house instructor, and certified by the State of Washington upon passing the test. The Pharmacy Manager performs their performance appraisal.

The techs' duties consist of accepting customer and prescription information, including refill authorization from doctors' offices. They retrieve medication from inventory, create and place prescription labels. They input customer and prescription data into the computer system, which they are permitted to do under Washington law. The record reflects that they spend 75% of their work time performing these functions. The remaining 25% of the work time is served by assisting customers and working the pharmacy cash register. The cashiers do not enter into the actual pharmacy (drug dispensing) area, and they do not mingle with the other employees, either during breaks or work time.

The Pharmacy Technicians have the same benefits as the cashiers, but are paid between \$13.00 and \$15.00 an hour, whereas the store cashiers are paid between \$7.00 and \$10.00 an hour. The bargaining history between the Employer and another UFCW local shows that the Pharmacy Technicians are part of the same unit with the

⁵ If the Keys are regularly supervisors on weekends or evenings, as opposed to only occasionally (say to cover the manager's vacation) that is sufficient to find them to be supervisors, even if they do not have such duties full-time or every week. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1977).

Cashiers at many stores in the greater Seattle Metropolitan area. Yelm is 50-60 miles from downtown Seattle, in Thurston County.

UNIT ANALYSIS

Section 9(b) of the Act provides that “the Board shall decide in each case whether, to assure to employees fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof.” The Act does not require that a unit for bargaining be the only appropriate unit, or the most appropriate unit. Rather, the Act requires only that the unit be “appropriate,” that is, appropriate to insure to employees “the fullest freedom in exercising the rights guaranteed by the Act.” *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Dinah’s Hotel Corporation, d/b/a Dinah’s Hotel and Apartments*, 295 NLRB 1100 (1989). Thus, a petitioner gets its choice of unit so long as it is *an* appropriate unit.

The Board has enumerated several general factors, which it utilizes in determining whether or not a given group of employees share a sufficient community of interest to form an appropriate unit. These factors include: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed, the qualifications, skills, and training of employees; frequency of contact and interchange among employees; integration of production masses; common supervision and determinations of labor-relations policy; and the history of collective-bargaining. *Kalamazoo Paper Box Corporation*, 136 NLRB 134 (1962). However, a single-location, an all-employee unit, excluding statutory exclusions such as supervisors and professional employees, is presumptively appropriate. It is incumbent on the party opposing an all-employee unit to prove that such a unit is somehow not appropriate.

In addition, the Board has a strong policy of not omitting small, fragmentary groups from otherwise-all-encompassing bargaining units – commonly referred to as residual units. To do so is largely to substantially limit such employees’ statutory right to organize. Here, the two techs would be the only unrepresented employees if excluded from the Unit.

The issue here, then, is not whether the techs *could* be excluded, but whether they *must* be excluded notwithstanding the Petitioner’s request that they be included. If the unit sought is *an* appropriate unit, the unit must stand. The unit sought is presumptively appropriate. The party seeking a different unit must upset that presumption.

Here there are differences -- notably hourly wages -- between the techs and the rest of the Unit. In addition, there is little interaction between the techs and the rest of the store employees. However, Tech B work is essentially cashiering, Tech “A’s” work is cashiering in substantial part, and the rest of the Unit routinely function as cashiers. All employees have the same benefits (apart from wages). There is some, but limited, permanent transfer between positions. There is a relevant Employer collective-bargaining history of inclusion of the techs, in a nearby major metropolitan area.

In addition, the Board has a strong policy of not omitting small fragmentary groups from otherwise-all-encompassing bargaining units – commonly referred to

residual units. To do so is largely to substantially withhold from such employees a viable opportunity to organize. Here, the two techs would be the only unrepresented employees,⁶ and no one is seeking to represent them separately.

Given the foregoing facts on which I heavily rely, the record as a whole, the presumption of appropriateness, and the policy against omitting small numbers of employees and creating a fragmentary residue, I find that the Unit sought is *an* appropriate Unit.

There are approximately nine employees in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate, at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFL-CIO, CLC.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Board's Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174 on or before July 5, 2002. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper

⁶ Except for the pharmacists who present an entirely different statutory omission.

objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 11, 2002. [Because of delays of US Mail directed to US government addresses in D.C., use of alternative delivery modes is strongly suggested.]

DATED at Seattle, Washington, this 27th day of June 2002.

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